

FILED
U. S. DISTRICT COURT
DISTRICT OF NEBRASKA

2014 DEC -8 PM 3:13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)
)
 V.)
)
 JAMES A. LAPHEN,)
 Defendant.)
 _____)

4:14cr3133

CRIMINAL INFORMATION

Count 1 18 U.S.C. § 371
Count 2 18 U.S.C. §§ 1001 and 2

THE UNITED STATES CHARGES THAT:

INTRODUCTORY ALLEGATIONS

At all times relevant to this Information:

I. BACKGROUND

A. TierOne Bank

1. TierOne Bank was a commercial bank and financial institution owned by a holding company called TierOne Corporation (collectively "TierOne"). TierOne was headquartered in Lincoln, Nebraska with branch offices in Nebraska, Iowa, and Kansas. TierOne provided a full range of commercial and consumer banking products to businesses and individuals.

B. The Defendant

2. The Defendant, **JAMES A. LAPHEN**, was a resident of Omaha, Nebraska. From in or around April 2002 to in or around March 2010, **LAPHEN** was the President and

Chief Operating Officer of TierOne. On or about March 30, 2010, LAPHEN was appointed by the Board of Directors as acting Chief Executive Officer of TierOne.

C. TierOne's Regulators

3. TierOne's stock was traded publicly on NASDAQ, a national securities exchange, and was registered with the United States Securities and Exchange Commission ("SEC"), an agency of the United States, pursuant to Section 12(b) of the Securities Exchange Act of 1934.

4. The SEC was an independent agency of the United States government charged by law with preserving honest and efficient markets in securities. The federal securities laws, regulations, and rules were designed to ensure that the financial information of publicly traded companies was accurately recorded and disclosed to the investing public.

5. As a public company, TierOne and its directors, officers, and employees were required to comply with the federal securities laws, regulations and rules, and to make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflected the transactions and disposition of the assets of TierOne.

6. TierOne was also required to file annual reports ("SEC Forms 10-K") and quarterly reports ("SEC Forms 10-Q") with the SEC containing audited financial statements that accurately and fairly presented the financial condition of TierOne, as well as other reports that contained information about TierOne's management, Board of Directors, business operations, and performance. Through these reports, TierOne disclosed its financial

information to the SEC, TierOne's shareholders, and the investing public. TierOne also disclosed its financial information to its shareholders and the investing public through other means, including through press releases and earnings announcements.

7. A public accounting firm acted as the independent auditor of TierOne's annual financial statements and reviewed TierOne's quarterly financial statements.

8. In addition to the SEC, TierOne was regulated by the Office of Thrift Supervision ("OTS"). The OTS was an agency of the United States charged with supervising and regulating federally-chartered banks and savings and loan associations.

9. Under the federal bank laws, regulations and rules, TierOne was required to disclose its financial information to the OTS and to the public through the quarterly filing of reports ("Thrift Financial Reports") that accurately and fairly presented the financial condition of TierOne. In addition to receiving information from TierOne through Thrift Financial Reports, the OTS also gathered information about TierOne through regular on-site examinations conducted at TierOne's headquarters in Lincoln, Nebraska. During these examinations, TierOne and its directors, officers, and employees were required to report accurate and truthful information in response to inquiries from the OTS's examiners.

10. In or around April 2008, the OTS commenced a special examination of TierOne. After the special examination, the OTS informed TierOne that the OTS was very concerned with, among other things, both the deterioration of TierOne's asset quality and the decrease in TierOne's capital ratios. In or around June 2008, the OTS directed TierOne

to infuse additional capital into TierOne in order to maintain a minimum capital position in relation to its loan portfolio and other assets of 8.5% (commonly reported as a “Core Capital Ratio”).

11. In 2008, TierOne submitted an application to the OTS seeking Troubled Asset Relief Program (“TARP”) funding. Ultimately, TierOne withdrew its application and did not receive TARP funds.

12. TierOne reported in its SEC Form 10-K for 2008, and in its SEC Forms 10-Q filed in 2009, that TierOne had fulfilled all of its obligations as set forth in the supervisory agreement, including meeting or exceeding the OTS’s mandated 8.5% minimum core capital ratio.

C. TierOne’s Loan Loss Allowance

13. TierOne historically focused on residential and agricultural loans in the Midwest, including in Nebraska, Iowa, and Kansas. However, in or around 2004, TierOne began to offer loans in geographical areas outside of its traditional lending business. To facilitate this expansion of TierOne’s business, TierOne opened loan production offices in, among other states, Nevada, Florida, Arizona, and North Carolina. TierOne’s new loan production offices generated hundreds of new loans, some of which were to residential real estate developers.

14. The loans that TierOne made through its new loan production offices helped TierOne grow its loan portfolio and other assets by billions of dollars. When TierOne first

offered stock as a public company in 2002, TierOne reported assets of approximately \$1.8 billion. By the end of 2007, TierOne had nearly doubled its assets, to approximately \$3.5 billion.

15. While initially TierOne's growth strategy appeared successful, in or around 2006, the real estate markets in TierOne's new lending territories began to decline. Many of the residential real estate developers who had borrowed money from TierOne were dependent on selling real estate to pay back the money they had borrowed. As a result, a significant number of TierOne's borrowers began defaulting on their loans.

16. If TierOne believed that it was not going to collect the entire loan balance from a defaulting borrower under the original terms of the loan, TierOne was required to include that loss estimate as part of the financial information TierOne submitted to the SEC and to the OTS (commonly referred to as a "reserve"). The total amount of the losses that TierOne estimated it would incur in its loan portfolio was reported to the SEC and to the OTS. This total was referred to as TierOne's "Allowance for Loan and Lease Losses" (also known as the "Loan Loss Allowance" or "ALLL").

17. In order to make a good faith estimate of losses on a loan, TierOne was required to take into account available information about the loan, including the value of the underlying collateral, which was typically the property under development, and the facts and circumstances surrounding the borrower's ability to make timely payments.

18. TierOne also was required to keep accurate books and records of any decrease in the value of real estate that the bank acquired through foreclosures. If TierOne believed that the real estate it owned had decreased in value, TierOne was required to either write down the value of the asset or include the amount of the decrease in value as part of TierOne's Loan Loss Allowance.

19. Any increase in TierOne's Loan Loss Allowance indicated that the bank's loan and real estate portfolios were deteriorating, as well as adversely impacted TierOne's assets and earnings. Similarly, any decrease in the value of TierOne's real estate portfolio also adversely impacted TierOne's assets and earnings. For that reason, TierOne's good faith estimates of losses in its loan portfolio and good faith estimates of the value of its real estate portfolio were material to TierOne's regulators and the investing public in evaluating TierOne's financial condition.

Count One
[18 U.S.C. § 371]

Conspiracy to Commit Mail Fraud Affecting a Financial Institution, Wire Fraud Affecting a
Financial Institution, Securities Fraud, and to Make False Bank Entries

20. The allegations in paragraphs 1 through 19 are realleged and incorporated as if fully set forth here.

21. From in or around at least 2008 and continuing through in or around at least June 2010, in the District of Nebraska and elsewhere, the Defendant,

JAMES A. LAPHEN,

did knowingly and willfully conspire and agree with others, known and unknown, to commit certain offenses against the United States, namely:

- a. mail fraud, that is knowingly and with an intent to defraud, devise and intend to devise a scheme and artifice to defraud affecting a financial institution, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises; and for the purpose of executing such scheme, knowingly place and cause to be placed in a post office and authorized deposit for mail matter a thing to be sent and delivered by the U.S. Postal Service and any private and commercial interstate carrier, in violation of Title 18, United States Code, Sections 1341;
- b. wire fraud, that is knowingly and with an intent to defraud, devise and intend to devise a scheme and artifice to defraud affecting a financial institution, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, knowing that they were false and fraudulent when made; and for the purpose of executing the scheme and artifice, knowingly transmit and cause certain wire communications to be transmitted in interstate and foreign commerce, in violation of Title 18, United States Code, Section 1343;

- c. securities fraud, that is, knowingly and intentionally executing and attempting to execute a scheme and artifice to defraud persons in connection with securities issued by TierOne, and to obtain by means of materially false and fraudulent pretenses, representations, and promises, and by statements containing material omissions, money and property in connection with the purchase and sale of securities issued by TierOne, an issuer with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78j), in violation of Title 18, United States Code, Section 1348.
- d. making false entries in a bank's books, reports, or statements, that is, knowingly and willfully making false entries in TierOne's books, reports, and statements with the intent to deceive the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, and any agent or examiner appointed to examine the affairs of TierOne, in violation of Title 18, United States Code, Section 1005.

All in violation of Title 18, United States Code, Section 371.

Purpose of the Conspiracy

22. The purpose of the conspiracy was to conceal TierOne's true financial condition from TierOne's shareholders, regulators, external auditors, and the investing public, including the value of the losses LAPHEN and his co-conspirators estimated TierOne would incur in its loan portfolio and its real estate portfolio, in order to: (a) forestall adverse

regulatory action against TierOne; (b) maintain and influence the market price of TierOne's stock; and (c) enrich the conspirators through the receipt of compensation and other benefits from TierOne.

Manner and Means of the Conspiracy

23. The manner and means by which LAPHEN and his co-conspirators sought to accomplish the objects and purpose of the conspiracy included, among others, the following:

24. First, LAPHEN and his co-conspirators purposefully overstated the value of TierOne's loan and real estate portfolio and understated TierOne's Loan Loss Allowance by (a) using outdated appraisals on collateral and real estate owned property; (b) understating the risk of certain loans; (c) delaying the seeking of new appraisals in order to conceal the current value of the loan collateral and real estate owned property; (d) rejecting new appraisals of loan collateral and real estate when those appraisals would have caused TierOne to increase its Loan Loss Allowance; and (e) restructuring loan terms to disguise the borrower's inability to make timely interest and principal payments.

25. Second, LAPHEN and his co-conspirators made misrepresentations, and caused others to make misrepresentations, to TierOne's shareholders, regulators, external auditor, and the investing public about TierOne's financial condition, by (a) submitting and filing reports, records and memoranda that provided a materially false, misleading, and fraudulent description of the value of various bank loans and the collateral securing those

loans; (b) concealing an internal analysis prepared by **LAPHEN'S** co-conspirators, which would have required TierOne to increase its Loan Loss Allowance; (c) concealing the existence of recent appraisals of collateral; and (d) concealing material information relating to the value of TierOne's real estate portfolio.

Overt Acts

26. In furtherance of the conspiracy and to achieve its objects and purpose, at least one of the conspirators committed and caused to be committed, in the District of Nebraska and elsewhere, at least one of the following overt acts, among others:

27. In or around July 2009, **LAPHEN** and others caused TierOne's financial statements to be manipulated to make it appear that TierOne had met or exceeded the 8.5% minimum core capital ratio mandated by the OTS.

28. On or about July 30, 2009, **LAPHEN** and others caused TierOne to file a Thrift Financial Report with the OTS that misrepresented TierOne's financial condition and performance.

29. On or about August 10, 2009, **LAPHEN** and others caused TierOne to file a SEC Form 10-Q for the quarter ending June 30, 2009 that misrepresented TierOne's financial condition and performance.

30. On or about October 11, 2009, **LAPHEN** and others caused a report to be submitted to the OTS that contained false and misleading statements about TierOne's analysis of losses in TierOne's loan portfolio.

All in violation of Title 18, United States Code, Section 371.

Count Two

[18 U.S.C. §§ 1001 and 2]

False Statements

31. The allegations in paragraphs 1 through 19 and 22 through 30 are realleged and incorporated as if fully set forth here.

32. On or about August 10, 2009 in the District of Nebraska and elsewhere, the Defendant,

JAMES A. LAPHEN,

and others known and unknown caused TierOne to file a Form 10-Q for the quarter ending June 30, 2009 with the United States Securities and Exchange Commission that materially misrepresented TierOne's financial condition and performance.

All in violation of Title 18, United States Code, Sections 1001 and 2.

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